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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Lackland 21st Century Services Consolidated--Protest and Costs

File: B-285938.6

Date: July 13, 2001

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Sharon A. Jenks, Esq., Department of the Air Force, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest seeking reinstatement of an earlier protest, and a decision on the merits of that protest because, in the protester's view, the agency has unduly delayed taking the corrective action promised in response to the earlier protest, is dismissed since the protester would have us consider a proposed course of action that has been abandoned, and any dispute about that action has been rendered academic.

2. Protester's request for a recommendation that it be reimbursed the cost of filing an earlier protest challenging a cost comparison under Office of Management and Budget Circular No. A-76 on the basis that the agency has not yet awarded it the contract (the promised corrective action that led to the dismissal of the earlier protest) is denied where the record shows that the agency reasonably elected to delay award until completion of a review by the agency's Office of Inspector General, which was, apparently, completed approximately 5 months after our Office dismissed the earlier protest as academic.

DECISION

Lackland 21st Century Services Consolidated (L-21) requests that our Office reinstate and sustain its earlier protests of a decision by the Department of the Air Force that it would be more economical to perform base operations support at Lackland Air Force Base in-house, rather than by contract. We dismissed those protests as academic after the Air Force advised our Office that its review of the protest allegations and the record led it to conclude that the decision should be reversed, and that the workload should instead be performed by contract (and hence by L-21,

since L-21 was the commercial offeror whose proposal was selected under solicitation No. F41689-99-R-0031 for comparison with the government's in-house cost estimate under Office of Management and Budget (OMB) Circular No. A-76). In addition, L-21 seeks a recommendation that it be reimbursed the costs of filing and pursuing both this request, and its earlier protests.

We dismiss L-21's request that we sustain its earlier protest on the basis that the earlier protest remains academic; we deny L-21's request for reimbursement of the costs of filing these protests.

BACKGROUND

L-21 initially protested to our Office on November 6, 2000 (B-285938.3), and supplemented its protest on November 13 (B-285938.5). In these protests, L-21 argued that errors in the agency's cost comparison led to an erroneous conclusion that continued in-house performance of base operations support would be more economical than contracting out the services.

By letter dated December 13, submitted in lieu of an agency report on the merits, the Air Force explained that its review of L-21's protest allegations and the record led it to conclude "that certain adjustments to the cost comparison should be made. These adjustments have resulted in a cost comparison decision favoring performance of the workload by contract." The letter also acknowledged that L-21 had been selected as the contractor to perform these services in an earlier part of the A-76 process, thus, the letter, in effect, advised that the Air Force would be making award to L-21. Given these conclusions, the Air Force requested that the protests be dismissed as academic. By decision also dated December 13, we agreed and dismissed the protests.

After our Office dismissed L-21's protest, the union representing base support employees at Lackland filed a motion for a temporary restraining order (TRO) in the United States District Court for the Western District of Texas seeking to enjoin the Air Force from awarding this contract as planned. This TRO was granted on December 20 and expired on December 30; despite the expiration of the TRO, however, this litigation was not dismissed by the court until March 7, 2001. Both the Air Force and L-21 advise our Office that the Air Force represented to the court that it would not award a contract during the ongoing litigation without first providing 5 business days notice.

In addition to the court case, there were several other pertinent events that occurred shortly after our Office dismissed L-21's protests. First, on December 20 (the same day the district court granted the TRO), the Deputy Secretary of the Department of Defense (DOD) requested a review by the DOD's Office of Inspector General (IG) of the cost comparison performed under OMB Circular No. A-76 to determine the most

economical means of performing base operations services at Lackland.[1] One day later, several members of Congress from the state of Texas also requested an IG review of the cost comparison.[2] On December 22, the IG formally advised the Air Force that it was initiating an audit of the Lackland cost comparison review at the request of the DOD Deputy Secretary. In this notice, the IG advises that its "objective will be to determine whether the A-76 process was fairly and impartially conducted by the Air Force during the Lackland Air Force Base Study."[3] Finally, we note that by memorandum dated the same day, the Under Secretary of the Air Force advised DOD management that due to the TRO and the IG review the Air Force would await the end of the IG review to award the contract to L-21. This memorandum also urged that the IG complete its review within 30 days because of potential complications related to a pending reduction in force at Lackland if the contract was not awarded prior to April 1.[4]

Despite the Air Force request, the IG review was not completed in 30 days. On May 11, L-21 filed the instant protest. In its protest filing, L-21 explains that it has learned that the IG "plans to conduct briefings and other meetings with members of Congress and/or their staff on Monday, May 14, 2001, regarding their review of the Air Force's Lackland procurement, in addition to publishing a report of findings." Protest at 9.

L-21 claims that the Air Force has improperly delayed taking the corrective action it promised almost 5 months earlier. Although L-21 acknowledges that this A-76 competition has been the subject of an ongoing review by the DOD IG focused on the cost comparison process, and acknowledges the litigation in the district court brought by the union representing Lackland employees, it argues that neither the review nor the court case provided a valid basis for the Air Force to refuse award to

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[1]Air Force Request for Summary Dismissal at 2.

[2]Id. We note for the record, however, that L-21 claims (and the Air Force materials suggest) that contact from the members of Congress may have preceded the request for an IG review from the DOD's Deputy Secretary. Since neither of these parties has provided our Office with the specific date, or documentary evidence, of this contact, this chronology is based upon the date of the congressional request provided by the Air Force in its request for summary dismissal, and not contested by the protester. In any event, the outcome here is not affected by whether the congressional request for an IG review came first, or followed the request for a review by the DOD's Deputy Secretary.

[3]Memorandum for Assistant Secretary of the Air Force (Financial Management and Controller) from the IG, Dec. 22, 2000.

[4]Memorandum for Under Secretary of Defense (Acquisition, Technology and Logistics) from Under Secretary of the Air Force, Dec. 22, 2000.

L-21 in the meanwhile. Thus, L-21 seeks reinstatement of its earlier protest, a decision on the merits of that protest, and reimbursement of its costs.

ANALYSIS

As a preliminary matter, we do not reinstate protests. A protest, like the one here, that was once academic is not "revived" by subsequent agency action. Instead, the subsequent action gives rise to a new basis for protest, even if some of the issues raised by the subsequent action are the same as the issues raised under the earlier protest. See Pemco Aeroplex, Inc.—Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 4-5. With respect to the specific request here, on December 13, the Air Force conceded that its initial decision that it would be more economical to perform base operations support at Lackland in-house, rather than contract out this effort, was improper. Thus, the decision that L-21 would have us consider no longer exists, and any dispute about that decision has been rendered academic by the concession in the Air Force's letter of December 13. QuanTech, Inc.--Costs, B-278380.3, June 17, 1998, 98-1 CPD ¶ 165 at 2.

L-21 also seeks reimbursement of its protest costs based on the agency's failure to promptly implement the corrective action it promised and upon which we based the dismissal of its earlier protests. L-21 points out that nearly 5 months after announcing its conclusion that the Lackland base operations support workload should be performed by contract (and hence by L-21), the Air Force still has not awarded the contract. In L-21's view, the review by the DOD IG did not provide a reasonable basis not to award it the contract. L-21 also suggests that the IG review, and the Air Force delay, have been caused by political intervention that similarly provides no reasonable basis for the delay.

With respect to protest costs, our Office may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the protest. 4 C.F.R. § 21.8(e). Such recommendations are generally based upon a concern that an agency has taken longer than necessary to initiate corrective action in the face of a clearly meritorious protest, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. QuanTech, Inc.--Costs, supra, at 2-3. We will also award protest costs where an agency unduly delays the implementation of promised corrective action that led to the dismissal of an earlier protest. See, e.g., Pemco Aeroplex, Inc.--Recon. and Costs, supra, at 6-7. We view the award of protest costs in such cases as appropriate because a protest is not truly resolved until the agency implements the promised corrective action that caused us to dismiss the protest. Commercial Energies, Inc.--Recon. and Declaration to Entitlement of Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499 at 6.

L-21's claim that the Air Force has unduly delayed implementing corrective action by withholding its award is based on its view that the agency is, in actuality, responding to congressional pressure, which has led to what L-21 terms a "directed" review by

the IG. L-21, in essence, posits a cascading abdication of decisionmaking authority at every level in this process. Thus, L-21 claims that the IG has abdicated its authority to select appropriate matters for review to members of Congress from the State of Texas (the "Texas congressional delegation"), while the Air Force (or the DOD) has abdicated its authority to conduct a proper cost comparison review both to the IG, and ultimately, to the Texas congressional delegation. L-21 argues that a decision to delay the award of a contract, when made solely at the request of members of Congress (or in response to a "directed" IG review undertaken solely at the request of members of Congress) is improper. In L-21's view, the Air Force must make an independent finding that a delay in award is merited before such an action can be proper. Alternatively, L-21 argues that even if the IG review here was not initiated due to congressional pressure, the Air Force still cannot reasonably rely on the IG review as a basis for changing or delaying its intended corrective action because the review here falls outside the scope of the IG's authority.

While L-21 complains about the actions of the Texas congressional delegation and the IG, our bid protest jurisdiction is limited to review of whether agencies' procurement actions complied with procurement statutes and regulations, 31 U.S.C. §§ 3551-52 (1994); evaluating the actions of the Texas congressional delegation and assessing whether the IG acted properly in initiating its investigation are not matters within the scope of our bid protest jurisdiction. Accordingly, we have not explored those issues and we express no view on them.

Our focus, instead, is on the propriety of the Air Force's actions and, in particular, on whether the Air Force unduly delayed implementing its corrective action. Pertinent to that inquiry is that the Air Force has not to date reversed or abandoned its December 13 decision that L-21 had won the cost comparison (and hence, should receive the award)--if the Air Force were to reverse that decision (and then either keep the work in-house or resolicit), L-21 could protest that action. At this point, however, the Air Force has simply held in abeyance award to L-21 pending the outcome of the IG's review. The question here is whether the Air Force has held award in abeyance so long as to constitute undue delay.

In our view, it was reasonable for the Air Force to await the conclusion of the IG's review, and then to take a reasonable amount of time to move forward. While we recognize that agencies must retain affirmative authority over their own decisions, and we have considered the cases cited by L-21 indicating that agencies may not abdicate their responsibilities in the face of congressional or other pressure, see D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971); Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 534 F. Supp. 1139 (D.D.C. 1982), rev'd, 714 F.2d 163 (D.C. Cir. 1983), we do not view the Air Force's decision to withhold award here pending a review by the IG as constituting abdication of its responsibilities. On the contrary: we view it as reasonable for an agency to wait for the conclusion of an IG (or other) review before proceeding with resolution of a public/private competition under OMB Circular A-76. We reach this conclusion based upon the complexity of the issues presented by the cost review; the need to consider the varied input

received; and our recognition of the disruption that may follow a decision to contract out base operations support at this facility--thus abolishing the positions of federal employees who currently perform these functions. Accordingly, we conclude that the Air Force has not unduly delayed corrective action here.[5]

The request for a recommendation that protest costs be reimbursed is denied.

Anthony H. Gamboa
General Counsel

[5] While this matter was pending, the IG apparently provided its report to the agency. We would now expect the Air Force to move forward on whatever course the agency decides to adopt, within a reasonable amount of time.